

THE

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SPEECH

OF

Sir *AUDLEY MERVYN* Knight,

His Majesties Prime Serjeant at Law,

AND

Speaker of the House of COMMONS in IRELAND :

Delivered to His Grace

JAMES

DUKE of ORMOND,

LORD LIEUTENANT of IRELAND,

The Thirteenth Day of *February*, 1662.

In the Prefence Chamber in the Castle
of *DUBLIN*.

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*The SPEECH of AUDLEY MERVYN Knight, His Majesties
Prime Serjeant at Law, and Speaker of the House of Commons in
IRELAND: Delivered to JAMES Duke of ORMOND,
Lord Lieutenant, of IRELAND, the 13. day of February, 1662.
in the Presence Chamlor in the Castle of DUBLIN.*

May it please your Grace;

ACCORDING to the antient priviledges of our House, We
have been ^{your} ~~the~~ suitors for this access into the Royal
presence: and your private spirit which knows not how
to deny, prevails so in your publick capacity, that even
for this your Graces particular condiscention, I am com-
manded by the Knights, Citizens, and Burgessees in Par-
liament assembled, to present you their most submissive acknowledg-
ment.

And surely this present solemnity of the House attending your Grace,
may carry the signification of a hand in the Margent, to point out some-
thing more then of ordinary observation.

This with us, is a as sheat Anchor, which is never made ready but
when we discern a cloud; perchance it is yet no bigger then a mans hand,
but by the best judgment we can make of it, it is like to overcast the
Horizon of this Kingdom; This makes this address of that importance,
that the House thought not fit to entrust it to the bare expressions of a
Speaker, (had he been of the greatest abilities,) therefore have they
committed it to this Instrument, that it might remain as a Record of
their endeavours, that the hard Fate and Ruine of an English Interest in
this Kingdom might not bear date under the best of Kings, under so vi-
gilant a Lord Lieutenant, under the first, (and if not prevented like to be
the last) Protestant Parliament that ever sat in this Kingdom.

It would confound Astrologers to observe such Planets, such mascu-
line Planets, ascending, in Conjunction, in the Houses of their exaltation,
and yet this Kingdom to be Planet-struck.

There is a time to speak, and a time to hold our peace; This, this, is the critical time, God calls us to it, when Religion, the establish'd Religion is in danger to be undermined by casting the predominancy of temper upon a Popish interest; And believe it Sir, whatsoever delusive Tenents have been broached a late, the contrary hath been written in Letters of blood, not in his Majesties Kingdoms only, but wheresoever the Papal power was exalted; That persons professing the reformed Religion, are but Tenants at will for their Lives and Fortunes, and through centuries of ages it appears, that as their Fleeces grow they are thorn, till a time of slaughter be appointed.

His Majesty, He hath called us by his Writ to no other end, but to offer up our ^{humane} Treble advice, *Ne quid detrimenti respublica capiat*; And if, ever the advice of Subjects may be serviceable to their Prince, this is the time, when this poor, miserable, and unfortunate Kingdom, fruitful by the blood of English, and plac'd as a greedy grave to bury their treasure in from age to age, is upon its new module: It is now in its mint-age, and our care must be, that the Miter be not stamp'd instead of the Crown; It is not long since the sale of this Kingdom was offered to the Miter, as his Majesties Interest was prostituted to every Roman Catholick power, so that it may be said of Ireland, as *Jugurtha* said of *Rome*: *O venalem Hiberniam, nunc perituram si modo emptorem invenerit*; Did I say his Majesty call'd us? May his Majesties days be long, and prosperous; Were we weltring in our blood, We must hold water whilst he washes his Hands in Innocency.

The Country calls Us, and were they not assured, We would speak for them, doubtless but your Grace had heard them speak for themselves by their treble Petitions: for the Alarm that *Hanibal* is at the Gates is hot throughout the Protestant plantations; We are his Majesties great Council, the grand inquest of the Kingdom, and We dare appeal to your Grace, how we have spent our time: We understand the usual proceedings in Parliaments, to begin at Grievances and conclude with supplies; We have inverted the Order, and applyed our selves hitherto in settling a constant Revenue for his Majesty, and granting other Temporary aids far above our abilities, yet far less then what his Majesties goodness may challenge from us; There hath been an imitable contention, as I may say, between the King and his Parliament here: if it were possible for Subjects to o'it-do such a King, We would; but 'tis possible for a King, and he hath o'it-done us, and therefore *ve illis*, Wo be to them, that in this Conjunction would undoe us both.

It must be therefore a forc't put, that presseth us on to this address, and our moderation even in it will appear, *Cuncta prius tentanda.*

It is in the body Politick, as it is in the natural, the brawny and fleshy members can admit a discontinuity of parts, though not without pain, yet without danger; But the apple of the eye is so tender, that the least dust is offensive to it: We enjoy the benefit of many good and wholsom Laws; But the Act of Settlement is the Law of Laws, it is the *Magna Charta Hibernie*, this is the apple of the eye, and must be printed with this Motto, *Nemo me impune lacessit.* Our strength lies in this as *Sampson* in his locks, if those be cut, we are as weak as others when the Philistins shall fall upon us: in the execution of other Laws, we tiche *Mint* and *Cummin*, in this we fulfill the weightier things of the Law.

Your Grace well remembers the struggling twins in the womb of this Act, Never Prince that sat upon the Throne, underwent so many pangs and throws, to give his Protestant Subjects a Birth and Life, as *Charles* the Second did; And we shall never forget the fainting expectations of the people for this bill of Settlement, when every ones Soul lookt out at the Casements of his eyes, as *Sifera's* mother, with a *Why are the wheels of his Chariot so long a coming*; But now Sir, with as great a sorrow We behold the driving of this Chariot to be like the driving of *Jehu* the Son of *Nimshi* that drove furiously.

We come not this day to reflect upon the Commissioners for executing the said Act: This house hath a great respect for that Court: it had part of our breath to give it life, and we are under the greatest obligation to admire his Majesties goodness & favour to his Protestants; (I shall never forget that expression of His Majesty at a full Council, My Justice I must afford to you all, but my favour must be plac't upon my Protestant Subjects) in sending over those Gentlemen, that were of our own Country and Religion. His Majesty warrantably judged, that if difference were betwixt an Israelite and an Egyptian, *Moses* would lean to the Israelite; His Majesty knew men of resolution might alter the Climate without changing sound principles, though even, those may be indanger'd by a constant and familiar conversation; with persons of different judgments: and so we may in time forget to attest the fear of *Abraham*, and learn to swear by the life of *Pharaoh*; We consider the comprehensiveness of the Act, their new beaten path of proceedings, *sape viatorem novum vetus orbita fallit*; The mixture in Hotch-pot of Law and equity,

so that they are both Jurors and Judges, and the summariness of the proceedings they deligne, so that the Text many times may happen not to be the Rule, but the hower-glass; His Majesties other Courts shoot a rest to a dead mark, and seldom or never miss: This Court runs and shoots at a flying mark, and therefore it is admirable if it ever hit aright. I say, Sir, We come not to criminate, or to force a Ball into the Dead, but if any Brick-wal expressions happen, that cannot be designed otherwise, it is rather a force upon us.

Upon the whole the Knights, Citizens and Burgeses, upon the serious observation they have made of the proceedings of that Court, have made this judgment, That without some speedy Rules and Instructions be given to those Gentlemen, as the line and plumb to direct the Executive part of that great Act of Settlement, that the lands justly forfeited to his Majesty upon the account of that late horrid and unnatural Rebellion in this Kingdom, and by his Majesty freely granted to the English (to improve and enrich which, they have beggared themselves) will be taken out of their possession, and themselves, wives and children exposed to mockery and misery; and the actual Rebels that yet survive, or the heirs and blood of those that died active in that Rebellion, be restored to the same, and this being all done under pretence of severe justice, the Roman Catholicks of this Kingdom, may get a reputation and credit to those Pamphlets they have dispersed through *Europe*, That His Majesties Protestant Subjects first fell upon and murdered them. Sir, the Commons cannot but be apprehensive of these Consequences, and therefore in this Instrument, have drawn certain proposals by way of humble advice, tendred to your Grace, in the name of the Commons of this kingdom: They are not of the nature to impose a y foreign sense upon the Act, they arise out of the bowels of it: they seek not to lay out a new way, but only where some corners and destowers are, to hang out light: and the greatest Courts of Judicature will put out snuffs, when to read a Statute they may have a Parliament light, especially a light held by that Parliament that past the Act: They have likewise their Convoy to your Grace, by a particular clause in the Act requiring the Commissioners to give an account to your Grace and the Council of their proceedings, and to follow such further directions as they shall from time to time receive from your Grace and Council pursuant to the Act.

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I shall crave your Graces leave and patience to read it in distinct paragraphs, and according to the commands of the House, to hint some part of their sense, for the reasonableness of them.

Forasmuch as by the Act of Settlement, there is a power vested in His Grace the Lord Lieutenant and Council, to give further Directions and Rules from time to time, to the Commissioners for executing the said Act, and forasmuch as it evidently appears to the House of Commons, That there is a necessity of several Rules and Directions to be given the said Commissioners, therefore the following particulars are to be offered to the consideration of His Grace the Lord Lieutenant and Council, as the humble advise of the said House in order thereunto.

This, though it sounds as a preamble or introduction, and so may be lookt on as a frontice piece or title page by some; yet by us is understood as an essential part of the structure: If our distractions were doubled, they could not divide us in our duty, *Nec natura aut Lex operantur per saltum*; you were not only the nearest port, but *Statio bene fida carinis*: And though the night should grow dark, and tempestuous upon us, your care hath hitherto been as a Beacon upon a high promontory, not only burning upon the arrival of a Fleet (such as this Address is) but even to secure the least Fisher Boat, the smallest and individual Interest, when it lays it course to you: Supreme Councils and General Assemblies, have upon created or imaginary necessities, gone to the Witch of Endor, and having taken their observations from their own *Ignes fatui*, instead of the Guards of Charles his Wain, have arrived at Tyber instead of Thames: Now, Sir, being in our right port, we shall break bulk; and the first proposal is this:

1. That the King be by the Court of Claims allow'd to be Party, (as by Law he ought to be) and that no cause be brought to Adjudication, till the Attorney General have a fair summons, and be fully heard.

Your Grace might think us under some distemper to offer this; for *utrum nix sit alba non est disputandum*: But if the Commissioners have declared in Court, That His Majesty is not concerned, and have before judgement given, refused to admit evidence upon record, offered by Mr. Attorney General in his Majesties behalf, pregnant with evidence
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to have proved the nocency of the person, and thereupon have declared the nocent innocent, and in a breath blown down the title of several Protestants, and their respective Heirs, their improvements, and the like: it is the duty of us serving in Parliament, judiciously having taken cognizance thereof, to offer some expedient against it. Sir, *Innocent*, or *nocent* is the question; which without any help of a *Septuagim*, is translated at the Bar of the Kings Bench, *Are you guilty of the general Rebellion of Ireland or not?* Samf. pl. Cor. 1. I wonder if they will not iasee this *inter placita Corone*: then under what title would they refer it? If the Commissioners be pleaed to consult their Oath prescribed by the Act, it is thus:

You shall swear, *That you shall to the best of your skill, truly and impartially administer Justice between His Majesty and the Subject, and between party and partie, in the place of a Commissioner for putting in execution His Majesties Gracious Declaration and Instructions for the settlement of Ireland, according to an Act intituled, An Act, &c.*

This Oath is framed in *terminis*, according to the exigency of the subject matter cognizable in every Claim by the Commissioners; for every Claim, Guilty, or not Guilty of the Rebellion, is one part, and hath hitherto been first tryed by them; and to this part the Oath provides in these words, *You shall truly administer Justice between His Majesty and the Subject*: Then admit the person be adjudged Innocent, yet the English Adventurer or Souldier, in case such Innocents Title to the Land be not good, is in this the Act; and then in the second place the Title comes in question, and for this the Oath is suited, *viz. And bewixt party and party.*

Regularly, either by Office or Attainder, forfeited Lands are vested in the King, and His Majesty being graciously pleased not to proceed by the severity of attainder, which reacheth life and corruption of blood on the one hand, nor the expense and delatoriness of others to be found, (not consisting with a Kingdom gasping for a Settlement,) was pleased to rest his Title upon a Trial of Innocency: so that exclude His Majesty to be party, the Commissioners Judgment cuts both wayes; The Irish are turned out of their Inheritances upon the account of Treason, and the King not party, the English shall have their Lands, and yet they were never legally seised in the king; so that Treason will seem to be a crime
not

not so much against the King, as against the Subject; Lands by the Act, are vested in his Majesty, so they be not the Lands of Innocent persons, (and Qualifications for the Trial of their Innocencie are positive) Lands are given to the Adventurers and Souldiers, if they belong not to Innocents, where rests the Freehold, in the Innocent persons? That is but conditional and contingent; Is it in the Adventurer or Souldier? that is but conditional and contingent; Is it in the King? it is there but conditional and contingent: Why then it is in *custodia legis*, to judge between these three persons; the Innocent can never have it if it be judg'd for the King, the English can never have it except it be judged for the King, then to exclude the King is in construction of Law to exclude the English; for the Commissioners Decree cannot give the Land to the English, except the Act and Law warrant it, but nothing by Law can pass from the King till it be first in him, and there is no way by the Act to place it in the King, but by the judgement of the Court betwixt the King and the pretending Innocent.

Courts of Justice, *ex officio*, if a Title upon the pleadings arise for the King, are to take notice of it and improve it, though the King be not party to the action, *Hob. 126. 127.*

The Court will award a writ for the King where the Title appears for him on the Verdict, though the issue find it not for him, *Hob. 118. 119.*

And where Statutes are made to put things in an ordinary form, and authorize inferiour persons for the execution of it for the ease of Sovereign power, or the ease of the Subject, yet they shall never restrain the Sovereign power or interest, *Dyer. 225. part 35. Hob. 146.*

Besides, this Act is a general Act as to this, nay, it is rather *Statutum generalissimum*, it concerns the King in giving and taking, which are Relatives, and the honour and justice of the King in performing really the intents of his Grants, doth as much concern him and his people, as doth his profit in enjoying and receiving Grants from them (they are the words of a Reverend Judge) the Lord *Hobart*, whose Spirit in the behalf and interest of the King, I would propose as imitable and exemplary to the Commissioners, I shall not alter a syllable of his own expression, (the case is *Sheffield* vers. *Ratcliff. Hob. 335.*) (viz.) *I must profess, that whensoever I have thought of this Case, and advised upon it myself, I have met with two strong affections, Zeal and Indignation; Zeal in behalf of the King, to preserve the ancient right of the Crown, against the invasions of Rebels and Traitors; Indignation when I finde*

Francis Bigod, that sometimes brought a puissant army into the field, to depose the King; failing in that enterprise, now to rise up in Judgment against him: that whom he could not by the sword destroy, he might supplant by the Law: For though Ratcliffe bear the name of this Case, yet I see nothing, but the Land of Francis Bigod, his State, his Right, and Title, his blood, his descent that maintains and defends it: Therefore let it not seem strange that I am warm in this case, for zeal and indignation are fervent passions: And I do profess to give prerogative to the right of the Crown in my care and vigilancy, and it is, *nobile officium judicis & debitum*, due by Oath and Office to watch for him who makes for us, *ne quid detrimenti respublica capiat*: And if charity begin at it self, so ought Justice to do, that the King who granteth Justice to all, should not be waiting to himself, &c.

Sir, This needs not by an application to be shaken together, it mingles with the present purpose, as water doth with water; I shall only observe that the breath of this Reverend Judge perfumes the presence Chamber: whatsoever is contrary in the like case, is like the stench of *mare mortuum*, that stifles whatsoever approaches it; This Francis Bigod was attainted and executed 28. H. 8. And this zealous expression was 13 Jacobi, by computation something longer then from the 23. Oct. 41. to 1662. Bigod was resolved into his first dust, and those dormitories have some priviledge, *de mortuis nil nisi bonum*, when the persons with whom the present issues is to be joyned, are living, *vivit, imo vivit, etiam in senatum venit*; The Queen 24. of her Raign, granted the same Lands to Edmond Lord Sheffield, and the Reverend Judge, and the Court retreated not to the objection made by our Commissioners that the King had parted with the Lands from himself, and so in a manner *qui potest capere capiat*, thereby to render that great Act of Settlement, the emanation of his Majesties Royal bounty, to be dispenc'd by a rule of Justice, to seem rather like a mull of Apples or Nuts thrown in the streets, to invite boys to scramble.

Before I leave this point, I shall crave leave to intimate to your Graces remembrance, (for truly if I should seek in this point to inform your Judgment, I were under an unpardonable guilt,) the opinion of his late Majesty of ever blessed memory, how far he concerned himself and the *Exact Collec-* dispensation of his Justice, in order to the Settlement of this *tion* Kingdom interested. In his Majesties Speech delivered to both Houses 14. Dec. 41. there is this expression; But still seeing the slow proceedings

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proceedings therein, and the daily disparition I have out of *Ireland* of the lamentable estate of my Protestant Subjects there, I cannot but again earnestly recommend the dispatch of that expedition unto you, for it is the chiefest business that at this time I take to heart, and there cannot (almost) be any business, that I can have more care of: I might now take up some of your time in expressing my detestation of Rebellions in general, & of this in particular; To conclude, I conjure you by all that is or can be dear to you and me, that laying away all disputes, you go on cheerfully and speedily for the reducing of *Ireland*.

In His Majesties answer to a Petition of the Parliament his Majesty delivereth himself thus: We cannot but thank you for this care, and your cheerfull ingagement for the suppression of that Rebellion, upon the speedy effecting whereof, *The glory of God* in the Protestant profession, the safety of the Brittish there, our Honour, and that of this Nation so much depends; all the Interests of this Kingdom being so involved in that business, &c.

In his Majesties Declaration to all his loving Subjects, published with the advice of his Privy Council, it is thus declared: (*viz.*) *And our hope is, that not only the Loyalty and good affections of all our loving Subjects will concur with us in the constant preserving a good understanding betwixt Us and our People; but at this time, their own and our Interest, and lamentable condition of our poor Protestant Subjects in Ireland, will invite them to a fair Intelligence and Unity amongst themselves, that so we may with one heart intend the relieving and recovering that unhappy Kingdom, where those barbarous Rebels practice such inhumanities and unheard of outrages upon our miserable People, that no Christian ear can bear without horror, nor story parallel; And a few lines after follows the words (viz.) Whereas We acknowledge it a high crime against Almighty God, and inexcusable to our good Subjects of our three Kingdoms, if we did not to the utmost employ all our powers and faculties to the speediest and most effectual assistance and protection of that distressed People: And we shall now conjure all our good Subjects, (of what degree soever), by all the Bonds of Love, Duty, and Obedience, that are precious to good Men, to joyn with us for the recovery of the Peace of that Kingdom, &c.*

In his Majesties message sent by the Lord Chamberlain to the house of Peers, it is thus said: *His Majesty being very sensible of the great miseries and distresses of His Subjects in the Kingdom of Ireland, which do daily increase so fast, and the blood which hath been already spilt by the bar-*

barousness and cruelty of those Rebels crying out so loud, &c. And in his Proclamation of the First of Jan. 41. *inter cetera*; We have authorized our Justices of Ireland, and other our Chief Governour or Governours, and General, or Lieutenant General of our Army there, and do hereby accordingly require and authorize

Exact Collect. 34. them, and every of them, to prosecute the said Rebels and Traitors with Fire and Sword, as persons who by their high Disloyalty against Us their Lawful and undoubted King and Sovereign, have made themselves unworthy of any Mercy or Favour, &c.

In an answer of His Majesties are these words, viz. His Majesty being more tender in that particular which hath reference to Ireland, as being most assured, that he hath been, and is from his Soul resolved, to discharge his Duty (which God will require at his Hands) for the relief of his poor Protestant Subjects there, and the utter rooting out of that Rebellion, **Exact Collect. 72** Thus far this Glorious Martyr, and these are but few of many.

But Sir, If any shall object, to what purpose serves this, a Rebellion is not disputed, neither is there any that ever questioned His Majesties abhorrence of it? I answer, Though several Pamphlets swarm, to fasten the rise of the Rebellion upon the Protestants, and that we drew the first Blood, and much of the like stuff, yet these places are not quoted to that purpose, it is but to shew how unreasonably His Majesty is denied to be a party in discovering who were guilty of that Rebellion so horrid and odious to all Christians, to use his Majesties words in another place, **Exact Collect. 71.** when especially this very Trial of Innocency and Nocency is the only way prescribed by the Act to vest the Lands in the King, and is to supply the defect of Attainder and Offices to be found, which must be in the Kings name; or that any Commissioners can strain the Act and Qualifications, to let Nocency be shrouded under Innocency, and Treason to become merit, Besides, it is to be observed, the Actors, Abettors, &c. of the Rebellion in Ireland notwithstanding this Jubilee of Indulgences under our gracious Sovereign, stands yet unpardoned, the punishment being left to the execution of this Act; and shall the King be excluded in the trial, and not made party? I shall say no more, but certainly those that are of that opinion, differ much in Judgment from his late Majesty, and his Majesty that now is, who inherits his Fathers virtues with his Throne: Besides, I will put your Grace in mind, that the Agents of the Roman confederate

confederate Catholicks of Ireland, amongst other their desires in writing, desired that his Majesties Council at Law, might be at large, and indifferent, but it would not be granted.

I shall further offer the Judgement of the Parliament in England, December 41 in their third Proposal to his Majesty, viz.

That you would be pleased to forbear to alienate any of the Forfeited and Escheared Lands in Ireland, which shall accrew to your Crown by reason of this Rebellion, that out of them the Crown may be better supported, and some satisfaction made to your Subjects of this Kingdome, for the great Expences they are like to undergo in that War. Exast. Colle^{ct}. 2.

I do not infer, that his Majesties necessities or revenues must be supplied or settled by the confiscation of innocent persons Estates; God forbid we should put that heaven into the Kings Treasury, or such Mandrakes into the Pot: But Sir, God forbid on the other side, that Nocents, Nocents in so high a degree, should for want of Evidence, that the Law allows in the Kings behalf, be made Innocents, whereby His Majesties Revenues so considerably settled in this Kingdome, should be reduced to nothing; and so the Protection we enjoy by his Majesties Army (for so is our condition in this Kingdom) be dissolved: and to compleat the misery, the Protestant Families turned out to the open Sky to entertain him, whom upon the account of Rebellion, his Sword had conquered. It is further worthy of consideration, That his Majesty is not onely concerned in his Revenue, but by a strict decreeing of just Forfeitures, answers a Debt his Majesty hath been pleased to take upon himself, by his Letters from Breda, to the Army here under the command of the Duke of Albemarle: The payment of that part of the Army in England, drew vast Treasures, whilst the Forfeited Lands here, by a due execution of the Act will discharge that Debt: Be pleased to consider the worthy Adventurers of England, of which interest saith his late Majesty, *I am resolved to be very tender,* and I am sure, Sir, it concerns a Protestant Parliament to be tender of them: Should our sins provoke God to visit us with so sharp a correction again, as he did in 1641. with what confidence could we expect Supplies from England, if former Adventurers, hottomed upon so strong a security, should after such, so long, so expensive solicitations, be disappointed. And Sir, we are upon the precipices of this ruine, when amongst all the persons that have been restored as Innocents, we cannot understand of one, neither
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can we say upon our own knowledge (and we come from all parts of the Kingdom) that any one of them, from 1641. to Sept. 1653. ever drew a sword against the Irish in Rebellion, or ever assisted the English Forces in the prosecution of them : And much of this ariseth, the King being not made party, by the vilifying of the witnesses produced by the English, the checking of the English Council at the bar, whilst the insolencies of the Irish Council are past over in silence, the disrespect unto Depositions, Evidences, and the absolute rejecting of other matters of Record, His Majesty we hope by your Grace and Council being thus flattered in his right, we come to the second Proposal, his evidence

2. *That all examinations and depositions whatsoever, taken for discovery of the Rebellion, or proceedings of the Rebels and their adherents or well, during his late Majesties reign, or in the time of the usurped Authority, All Books, Rolls and Writings, remaining in any Offices belonging to the Court of Claims, or in any of his Majesties Courts of record, as also the Books of Kilkenny, be taken for good evidence in behalf of his Majesty, to bar such person or persons of their Innocency.*

Sir, We promise the King to be party, and then this proposal reacheth but to evidence concerning guilty or not guilty of the Rebellion in Ireland, but as in the general, as to evidences and proofs, We must take notice that the Law distinguisheth times, and according to Emergencies, suits and applies its remedies ; This is the great design of the Statute law, to alter and change the garments of the Law, according as the dimensions of the body politick alter and change ; The Necessity of this Rebellion no History can parallel, (to use his late Majesties words) and yet to come to the proof of individual persons acting in it, is no easie matter. In the late Wars between France and Spain, puissant and numerous Armies have been drawn into the field, and yet how few individual persons by exact proof of the adverse party, could be concluded to have ever been present at any of those battles ? Our Case differs not ; We were as distinct Enemies as French and Spaniard, the English under his Majesties government, the Irish under a supreme Council, and general Assembly ; how can We witness without seeing, how could We see without fighting ? during which Act, Our spirits on both sides exercised not so much the reflect Act what We should do hereafter before the Judge,

as the direct Act what we were to do upon the place before our general.

Silent leges inter arma, was never more truly applicable, did our present occasion bear analogy with nets and routs in time of peace, the law enabled us by means to maintain a distinct proof, but Sir, it is a true maxime, *quod remedio destituitur, ipsa re valet si culpa absit*; and the law where the subject matter in demand will not admit of proof, will supply it, denying to deliver the money, the law 2 Bulst. 310. will counter it a sufficient proof to maintain a conversion of it; And the great Act of Settlement had in its prospect these difficulties, the Act p. 4. words are (*viz.*) *And forasmuch as the Rapines, Depredations and massacres committed by the said Irish and Popish Rebels and enemies, are not only well known to this present Parliament, but are notorious to the whole world, Notwithstanding the many Means and Artifices, which for many years together have been used, to murder such Witnesses, suppress such Evidences, and also to Vitiate and Imbecil such records and Testimonies as might prove the same against particular persons, &c.* Thus your Grace observes the Judgement of King and Parliament, that this is an extraordinary Case, and it is not disagreeable to law, *Nobis injuriis emeritis non apponere remedia*, and we ought not to allow that imperfection in our Law (living in the most glorious constitution in the known World,) that Treason and Rebellion should pass with impunity, because though the Law meets with these Enemies, *per se*, yet that it should suffer them to escape, nay, to triumph, *per accidens*; No sir, the Law will do much, *ne cunctis D mini Regis deficiat in justitia*.

But Sir, more particularly; The Law betwixt party and party, allows in many cases, Examinations to be taken, *in perpetuam rei memoriam*; If so, it would be a hard consequence of his Majesties and Council foreseeing the difficulty of proofs, *flagrante bello*, should authorise persons to receive examinations that then might be had, if afterwards no use should be made of them; It is as true that *Rex non præcipit inutilia*, as that *Lex non præcipit inutilia*; It is a remarkable Case of Sir Randolph Cro. Car. Crew (ver.) Geo. Vernon: That examinations, & witnesses taken 69. 70. by Commission after the death of King James, (which Commission legally was determined,) yet should be allowed to be good especially, (as the words of the Judges are) in a Court of equity, where the proceedings are *jure naturali*, and not according to the strict course of Law: and be pleased to observe their further reason, certified to his Majesty,

(*vic.*) Otherwise it would draw into question many tryals by verdicts of *Nisi prius*, and Tryals and Attainders upon Goal-deliveries, whereupon divers have been arraigned and executed since the Kings death: so that your Grace may observe the prudence of the Law, to obviate inconveniences, and therefore *multa conceduntur per obliquum quae non conceduntur in directo.*

Besides, the Law requires not the attending of circumstances so precise from matters given in evidence, as it doth from the same matters by way of pleading; A man shall not plead a Record except it be in the same Court where it remains, unless it be exemplified under the great Seal, but otherwise, it may be given in evidence; a Cancel'd Deed, (after Testimony given of the matter of fact how it came to be cancel'd,) was read in evidence: proofs by deposition taken in the Exchequer in a former suit, shall be allowed, notwithstanding the parties are alive: *a fortiori*, depositions taken in the kings case, and between the same parties as in our case it is: But true it is where the King is Plaintiff, and the defendant claims by Feoffment, and to prove it duly executed, desired some depositions taken at York might be allowed, the Court refused it, because the original of the depositions were gone so as the King must fight with weapons assigned him by his adversary; so if the Plaintiff cannot find his witnesses to give testimony *viva voce*, then he is as it were dead unto him and his depositions in an English Court betwixt the same parties, may be read to the Jury.

It is further observable, that in Tryals the Law allows evidence, according to the necessity of the subject matter: If the Lord distrain for Escuage, and the Tenant pleads, that he was with the King in Scotland, it shall be tried by the Certificate of the Marshal of the Kings Host: If in avoidance of an outlary, it is alledged he was at prison in Burdeaux, it shall be tried by the Certificate of the Mayor of Burdeaux: The issue was upon full age, and two Church Books were given in evidence.

But it may be objected, That it would seem hard that Depositions taken by usurpt Authority should be good. I answer, The same reason that warranted Judicial proceedings in those times to be confirmed, may allow these, only the reason is stronger in our case, because the matter of fact hath been so shifted, that the truth can appear no other

way : To this I add, that by the Act of Settlement they are allowed, the words are these ; *And whereas several of your Majesties Subjects, by whom as instruments, the said Rebels were totally subdued, did in the time of your Majesties absence beyond the Seas, (be pleased to observe, this was in the time of the usurped Power,) for supply of the then pressing necessities, and to prevent the further desolation of your Majesties Kingdom, (here necessitas vincit legem;) Enquire into the Authors, Actors, and Abettors of the said Rebellion and War, (and this was by Offices, examinations, &c.) And after much deliberation amongst themselves, and advice from others had thereupon, did dispossess such of the said Irish Popish Rebels of their said Lands, Tenements and Hereditaments, as they found guilty of, and to be engaged in the said Rebellion or War, and did withall distribute and set out the said Lands, &c.* Your Grace may observe in this clause, here is the guilt, the proof, the Judgment and Execution concerning the Rebels Lands, and the date of those proceedings, is, during his Majesties absence, and yet this is laid as the Ground-work of that clause which vests the Lands in the King : for all the Characteristical letters of forfeited Lands in the 4. and 5. page of the Act of Settlement, are the manner and ways of seizing, sequestering, distributing, allotting, &c. of those Lands under that power: for either that way must have been observed, or otherwise, the Irish being a confederate body, associated by oaths, established under a Democracy. And lastly conquer'd by Arms, must, and of right might have been, according to the Law of Nations, condemn'd in grois; It is to be feared, the King will encounter many deeds and Settlements, and lewd witnesses, it is but reason he should defend himself by his own that are just; And if by one of the Acts of Usurped Powers, His Majesty settles the peace of his Kingdoms, it is but a part of Royal Chymistry, out of poysonous minerals, to extract a cordial.

Act Settl.
p. 2

Propos. 3. *That such Proclamations, or any Act of State, as have declared any person or persons, and their adherents, Rebels before the Cessation in this Kingdom 1643. by His Majesties authority, shall be good evidence in the Kings behalf, against such person or persons, to the impeachment of their Innocency before His Majesties Commissioners for the execution of the Settlement.*

A Proclamation is part of the Kings prerogative, and obtains in cases of necessity, the force of a law, and is therefore sometimes termed *Lex temporis*; If the King proclaim a Tilting to be held, and one kills the other in that exercise, this Proclamation, shall be good by pleading, or evidence to excuse the Felony; The King by Proclamation may inhibit the Subject to go out of the Realm, and if the Subject doth
 11. H. 7. 33. a. against it, it is contempt, and he shall be fined; and since
 f. n. b. c. 85. c. it is a Law to fine, it will be good evidence to justify it:
 It was no time for Sheriffs in the ordinary court of Law to make Proclamations, in order to Outlawies, when without an Army it was hazardous to march 2. miles from *Dublin*; His Majesties Proclamation of the
 1. J. m. 1641. invites them, to lay down their armes, and forbear all further Acts of Hostility; If this Proclamation from
 Col. 35. pag. Mount Gebal will not take place, that from Mount Gerazim must. And we never yet received an instance that any embraced those offers of mercy; but though His Majesty hung out a white flag, they advanced one of red; I shall only add this, that it seems reasonable, that if His Majesty by name declares I. S. to be a Traitor, and to be prosecuted with Fire and Sword; in such case, if any good Subject should destroy the said I. S. he shall be indemnified by the Proclamation, why then admit I. S. have escaped to this day, I say if no intervenient Act of grace from His Majesty obviate it, this Proclamation may sorely impeach his Innocency, that might have warranted me to take away his Life.

Propos. 4. That where by any Order or Orders of the House of Commons, since 1641. and before the first Sessions of this present Parliament, any of their Members, upon the account of the Rebellion, have been adjudged to be rotten Members, and fit to be cut off, and have Ordered the Speaker of the said House to direct his Letter for the issuing out of writs to supply their places: That such Orders shall be allowed as good evidence to bar such person or persons of their Innocency.

It is first to be observed, this extends no further then to the members
 And your Grace may remember, the Parliament
 the Rebellion, had reason to enquire what
 of the house; they found many English
 murdered,

multiplied the ways for travelling obstructed for such as survived, or otherwise they were engaged in His Majesties service, for defence of this Kingdom; the Irish they expected after Order upon Order, with their names publicly affixt, whereupon they did conceive one or more Orders, expressing the names of such persons, who upon their own knowledge, were engaged in the Rebellion. The House of Commons

is a considerable Grand Jury, its a good *Bills vera* they
 4 *Institut.* 23. return: Their orders are records; and that appears also by
 6. H. 8. c. 16. where the words are, *viz. And the same*
Licence be entered on Record in the book of the Clerk of the Parliament ap-
pointed, or to be appointed for the Common-House, &c. And
Account of the more directly in the point upon the Trial of *Harrison*
Tryal, f. 45. the Regicide, Mr. *Jessop* was produced to attest several
 Orders of the Commons House, Mr. *Jessop* being Clerk
 of the house.

Propof. 5. *That the English quarters be ascertained from time to time,*
until His Graces recess in 1647. and that all quarters not so ascertained, be
adjudged the Rebels quarters.

Sir, the qualifications are the Soul and spirit of the Act, and amongst
 the qualifications, that of living and enjoying their Estates real and per-
 sonal in the enemies quarters, is *velut inter ignes Luna minor*, it is the
 Elixir of them; and therefore till those be ascertained from time to
 time, we are as in a Labyrinth, without a clew: It is offered to be
 ascertained from time to time, for the motion of war is planetary; and
 there were ebb and spring-tides according to the success of the Ar-
 mies: This will much expedite time, and abate the *Alamode* sin of per-
 jury: it will answer much the proceedings of the Common Law, where
 a prohibition lies, when the bounds of Parishes are in question: when a
 question is, whether Lands be in ancient demeasne, it is
 3 *Cro.* 228. tried by the books of domesday: This is the *Sibboleth*
 5 *H.* 5. 10. to distinguish an Ephramite from a *Gileadite*, and the
Hob. 188. bounds of the brook *Kidron*, warranted the judgment
 against *Shimei*.

Propof. 6. *That where two or more persons have claimed one and the same Lands, Tenements and Hereditaments by feveral Titles, that fuch persons Titles be tried and afcertained before the faid Commissioners proceed upon the trial of Innocency of any or either of them.*

Without this, it will reſemble ſome Games at Cards, where the Proteſtant Defendant will aſſuredly have his Cards Ruſt upon one Hand or another; for example, Three, or Four, or more (for that is uſual) Claim the ſame Lands, now their reſpective innocencies come firſt in Tryal, if three or four be judged nocent, and one innocent, by agreement (to give it no other name) amongſt themſelves, the other Titles ſhall veſt in him, who obtaining his Decree of Innocency, ſhall carry the Lands, whereas *re vera* the Title was not in him, and yet the Court, (according to this unreaſonable Rule) excuſable, as to the Judgement, and the Proteſtants to the defence, who cannot have Cognizance of ſuch Privy and Dormant Titles: This Propoſal answers but the Rule of Inter-pleading in the Law, wherein to give one inſtance of many: Two ſeveral perſons being found Heirs to Land, by two ſeveral Offices in one County, it is doubtful to the King to which of them he

8.E.46. ſhall give Livery, and therefore before Livery ſhall be made to either, they ſhall interplead, that is, formerly try between themſelves who is right Heir.

Propoſ. 7. *That in all Claims, the Title to the Lands, Tenements and Hereditaments, be firſt tried, and that the deeds of all Nocents be left in the hands of the Court, there to remain.*

What hath been offered to the laſt Propoſal, may in part ſerve to evince the conveniency, if not neceſſity of this: It hath its riſe from a maxime in our Law, *Fruſtra fit per plura quod fieri poteſt per pauciora*;

for if it appear, that the party hath no Title, the labour of 8. Co. 167. trial of Innocency is ſaved, where it is probable witneſſes may ſtrain the point ſo far, as to make themſelves Nocent before God, to make another Innocent before man; and it is but conſonant to the uſual proceedings in Law, that where it appears to the Court upon the Plaintiffs own ſhewing, that he hath no title, though the Defendant's plea may be vicious, yet he

Cro. Et. 230.

(21)
he shall never have Judgement: Besides, Sir, it is to be observed, That the Tryal of Innocency is by the Act of Settlement adopted into the place of an Office found, and so is in nature of traversing an Office, in which case the Law is clear, that none shall be removed to traverse the Title of the King without making a Title to himself. *Stamfor. 63, 64. 38. E. 3. 18.*

As to that part that desires the Writings of Nocent persons to be left in the Court, it cannot work a prejudice to them; for the lands being adjudged against them, to what purpose will the Writings operate in their Lands: But Sir, I correct my self, they will have an operation: and this puts me in minde of a plain, but apposite similitnde: Sir, in the North of *Ireland* the Irish have a custome in the Winter, when Milk is scarce to kill the Calf, and reserve the Skin, and stuffing it with Straw, they set it upon four Wooden feet, which they call a Puckan, and the Cow will be as fond of this, as she was of the living Calf, she will low after it, and lick it, and give her Milk down so it stand but by her: Sir, these Writings will have the operation of this Puckan, for wanting the Lands to which they relate, they are but Skins stuffed with Straw, yet Sir, they will low after them, lick them over and over in their thoughts, and teach their Children to read by them instead of Horn-books, and if any Venom be left, they will give it down upon the sight of these Puckan Writings, and intail a Memory of Revenge, though the Estate tail be cut off: Sir, how little soever this may weigh, yet in the Government of *Rome*, when the *Tarquins* were put down, not onely all Moneys and Sculptures that might retain their Memory were by publick sanctions decried, but such Innocents as retained the name, were forced to assume new ones: The *Israelites* remembered the Flesh-pots of *Egypt*, when *Manua* was before them, but when they wanted Water they murmured.

Propos. 8. *That were the Claimant claiming an Estate of Inheritance, hath not set down his title certain, in such case the Claimant shall be adjudged to claim in Fee-simple, and not otherwise.*

Sir, to open this Proposal, Matter of Fact must be thus stated, The Irish put in their Claims generally under such expressions, That he is seized as of a Demeain in Fee, or Fee-tail, or some other Estate of inheritance in use, possession, or remainder: This hath been excepted
against

against, but it hath been over ruled to be a very good form of pleading : Indeed it is Sir, for one cause, to take away all probable means whereby the Protestant Defendant may maintain his Cause, it indangers him not onely to lose his Land, but first to lose his sense: Those Presidents will enrich our Books of Entries as the *German* word *Plunder* did our *English* Dictionaries, whilest it beggard our Nation. Besides Sir, to demand Oyer of any Deeds hath been over ruled by the Court, so that when according to the present proceedings We come to know the Title of the *Irish* Claimant, We have no more time of defence, then the Fowl hath, that no sooner sees the Fire in the Pan, but dies of the shot in the Body.

And since the Law pre-supposeth every man of full Age to know his Title, what shall this be accounted but a stratagem? and those fortifications are hardly tenable, when one standing upon the lines of defence, may be shot *par derriere*, is certainly the center of the Law,

Br. s. b. 2. and therefore it says, *O portet ut res certa ducatur in judicium* :

5. Co. 3. 21. *certa esse debet intentio & narratio* : Unhappy was that declaration in trespass, *quare clausum suum fregit & pisces suos*

cepit, which was judged Vitious for not shewing the number or nature of the Fishes, when Lands, Tenements, and Hereditaments that in the Providence of the Law, are more worthy then two Fishes that are sold for a Farthing, may be demanded and recovered under all the incertainties and disguises that may be: But the readiest way to make *Sampson* to grinde, is first to put out his Eyes.

Propos. 9. *That where any person or persons have put in his or their Claim, before the former or present Commissioners, and after put in another Claim of a different Title, the best Title for the King shall be taken.*

Sir, It is usual for Merchants to put off an old Stuff under a new name, and here is new Stuff put off under an old name : This by the Commissioners is called a *Retraxit*, and if they please to make good the word as the Law understands it, no exception will be taken; for a

21. C. 4. 38. *Retraxit* is when the Plaintiff or Defendant comes in proper

8. H. 6. 8. person into the Court, where the Plea is, and saith that he will not proceed any further in the same: Now this

will be a Bar to the Action for ever, *qui semel actionem renuntiaverit amplius repetere non potest*; but this *Retraxit* is much like the *Retraxit* of a Ram or Goat, that requires to make his assault with a doubled strength :

Truly Sir,

Truly Sir, We know not upon what Clause in the Act this proceeding is warranted: the proceedings before the former Commissioners are allowed, true it is, That some Commissions that issued from them for valuation of Lands, in order to Reprisal, are suspended until a new valuation issue by the present Commissioners, and then the best return for the Kings Service is to be made use of; if it be objected, those Claims were put in upon the Declaration and Instructions, which by the Act possibly may be altered, it is easily answered, either the Act hath given them a new Title, or it hath not; if it hath given them a new Title, then they are in by the Act, and not by any former Title; if it hath given them none, then their old Title is that they must rely on: But admit an election be, the Law is clear, and so resolved, that there is no election against the King. Noy. 29.

Propof. 10. *That no Claimant claiming by innocency, shall be allowed to make any other Claim, in case he shall be adjudged nocent.*

Sir, We must crave your patience to consider this Case; And first, the Act of Settlement (omitting other divisions,) divides the Irish into Innocents and Nocents, and there is but one subject matter, upon which both these distinctions have their prospects, *scilicet*, the recovery of their Estates; I shall grant, that election of Actions belongs to every Subject as his birth-right, but likewise it must be *Dep. 20. 21. 57.* granted, that where he hath made his Election, prosecuted it, and determined it, he cannot have recourse to renew his election, being not suspected, but extinguished; I speak this with this *salvo* that a person that by particular clause in an Act, hath an Estate granted unto him, he must take finally and *sub modo*, as the Act appoints, and hath no election to claim upon any former *B. remitter. 49.* or other right; The body of the Act is but consonant herein to the body of the Law that delights *finem imponere litibus*, and hateth all circuit of action: If a man by his deed granteth a rent charge, and the rent is arrear, it is in the Grantees election to bring a writ of annuity or distrein; but he can *Litl. Sect. 219.* make his election but once, for if he recover in a writ of annuity, he shall never after distrein, or if he doth distrein, and avow in a Court of Record, he shall never after bring a writ of annuity, because an avowry in a Court of Record being in the nature of an action, is a determination of his election, before a Judgment given, *a fortiori* after Judgment given.

If a Wife be endowed *ex assensu patris*, and the Husband dyeth, the Wife hath election either to have her Dower at common Law, or *ex assensu patris*; but if she bring a writ of Dower at Common Law, and Court, albeit she not as yet recover, she shall never after claim her Dower, *ex assensu patris*.

So if the Grantee bring an Assize or the rent, and makes his plaint, he shall never after bring a Writ of Annuity :

10. E. 4. 17.

1 *Institut.* 145.

Nay, when an Election is given to several persons, therethe first Election made by any of the parties shall stand.

A Man by his own wrong may lose his Election, as if a Feoffment be made of two Acres, the one for Life, and the other in Fee; if the Feoffee maketh a Feoffment of both, the Feoffer may enter into which of them he pleaseth, because the Feoffee hath lost his Election, 2 Co. 36. 37.

It is well known, that where many times in one case, the Law doth give a Man several remedies, that by the folly of his Election, he may bar himself for ever, 1. *Inst.* 27. a. b. 279. a. Its at the election of the issue in tail, to enter, or to allow himself out of possession, and bring his *Formedon* : its at my election, if one receives my rent, if I will charge him with a Disseizin, and allow my self out of possession, and bring an Assize, or have an action against him. 1. *Cro.* 220. but I shall be bound up by that election to the advantages or disadvantages that accordingly attend it. So it is in the Claimants election to claim by Innocency or Nocency, but after Judgment given he shall be concluded.

Propos. 11. *That any person claiming as an innocent, shall after proof of the title, proceed to prove himself to have been faithfull and loyal unto, and never to have acted against his Royal Majestie, or his Father, before the Defendant shall urge any Crimination, and that for defect of such proof of Innocency, the Claimant shall be adjudged nocent.*

The very letter of the Act rules this point (page 17. of the Act.) viz. *That all Innocent Papists, being such as shall prove themselves to have been faithfull and loyal unto, and never acted against our Royal Father, or our self, &c.* The evasion, that this relates only to innocent Papists of *Connaught*, will not hold, except by some Philosophical rule, we may

may ascribe a particular malignity to the Climate of that Province: it is also agreeable to the rule of law, *Alteri incumbit onus probandi*, they are the plaintiffs, and have Estates granted to them, upon condition that they prove themselves innocent: There is an Objection, the Solution whereof will abundantly clear this point: The Objection is, *Stabilitur presumptio d nec probatur in contrarium*, and therefore every of them shall by Judgment of Law be presumed Innocent: I will grant this to be regularly true, but *distinguenda sunt tempora*: when the whole Kingdom is under the serenity and calm of peace, and his Majesties Writs have their free course, every Man shall be presumed to be a Loyal Subject, for what appearance is there to the contrary: But if a part of the kingdom shall rise up in arms against their Sovereign, and assume a contradistinct Government, and in defence thereof maintain a war, and which is worse, a cessation, with dereliction of his Majesties Forts, and the Inheritances of his Subjects, Nis---this latter being an Act of Judgment and deliberation, and this by Oath of Association, and by the strictest rules of Confederacy, who is it, that without the violation of charity and reason, can judge all or any of them Innocent, till by distinct and authentique proof, they have separated that guilt from themselves, which for so many years unto blood they espoused: upon this construction be pleased to hear the words of the Act, for that is the Touchstone of pure or adulterate expositions; viz.

Whereas an unnatural Insurrection did break forth against your Majesties Royal Father of ever blessed memory, his Crown and Dignity, in this your Majesties Kingdom of Ireland, upon the 23. of October, in the year of our Lord God, 1641. and manifest it self by the murders and destructions of many thousands of your said Majesties good and Loyal Subjects; which afterwards universally spreading and diffusing it self over the whole Kingdom, settled into, and became a formed, and almost National Rebellion, &c.

The case being thus truly stated, it is easie to discern both from the nature of proof, being the affirmative, and the advantage that they are to receive by it, that they must purifie themselves according to the purification of the law, before they can be admitted to offer in the Temples of Justice: And therefore the case will be much like, as where a bargainer shall endeavour to avoid the bargain, by reason of the *non enrolement* within six months he must make manifest proof thereof, or else it will be presumed that it was enrolled within the six months. 4. Co. 20. Sir,

if an innocent person will endeavour to avoid my present Estate, upon surmise that he was not guilty of the Rebellion (being a Roman confederate Catholick, under which Title the War was maintained) he must prove his Innocency, or else it shall be presumed he was one of them.

A. and B. Tenants in common of a Mannor, A. purchaseth a Frank-Tenement mixt with the Demefne lands which were not certainly known; B. brings a Writ *de partitione facienda*, of the Mannor onely: It was held by the Justices that A. must prove the bounds of the frank-tenement purchased: For the Jury shall be discharged if in Conscience they make partition, *De tanto quanto presumitur & dicens scitur per presumptiones & verisimilia*, Dyer. 266. So, Sir, the Irish Claimant coming under that violent presumption of Nocency, if he will not prove the bounds of his atings and conversation during that War, the Jury (if there were one) or the Court as it is at present, are discharged, if they judge him nocent, if upon proof allowed unto him he cannot clear himself of that presumption: I say that violent presumption, because the Act casts it upon him, and *Fortior est dispositio legis quam hominis*: Nay, that Act to which he himself is a party; so that every Irish Claimant that appears in the Court, the Law supposeth him to plead thus; I confess the Rebellion in Ireland was universally spread, and became almost National, yet whosoever is innocent amongst us, and so can prove himself to be, must have his Estate without a previous Reprizal, and not otherwise, I am an innocent: Pray Sir, admitting that the King by no grant or engagement had disposed of this persons Estate, would not you judge that Court very complementary, that upon such allegation would judge him his Estate without any proof: There is very little of my Lord *Hobbs* zeal and indignation in that Court.

Besides Sir, if this were an imposition, it is no other then what the Natural Olive is subjected unto: Those Officers that ever faithfully served His Majesty, called the 49 men; and then why should the wild Olive repine? Before they can be admitted to state their Arrears, they must prove in what Regiment, Company, Troop they served, with a *continuando* during their service; And nothing is more practicable. In the Barony of *Enishman*, there are above two thousand Irish can bring hundreds of Protestants to witless their civil demeanour through the whole course of the Distemper in this Kingdom.

Propof. 12. That every Claimant doth summon the owner or Defendant of the Land, or upon Affidavit made, that he nor his dwelling cannot be found, the Tenant and Attorney of the Defendant, and after fuch Summons, notice be given of the day of hearing the faid Cause, by posting the name of the Claimant, and list of Lands in the Court thirty dayes before the hearing in Leinfter, and forty dayes in any of the other Provinces, and that the Commiffioners be defired to publish the Lists promifed.

A true regulation in this particular of Summons and Procefs of the Court, is of great importance: Errors in this, are like faults in our first decoction, not to be remedied: Notwithstanding the long experience, and curious obfervations of the fefled Courts of Juftice, in 31 Eliz. C. 3. which with us was Enacted 10 Car. C. 12. we were forced to have recourfe to a Statute for the avoiding of fecret Summons in real actions: Courts of Equity adhere clofe to their procefs: In Courts of Law they are fitted according to the nature of the Actions to which they relate; and it is apparent, if this point be not afcertained in a different way then as now it is ufed, many perfons will be, as fome already have been, decreed out of their Estates unheard, notwithstanding their greateft vigilancy to defend them.

Propof. 13. That the Commiffioners obferve to proceed in the tryal of Claims of Innocents, onely in the refpective Counties, according to the priority heretofore publifhed by themfelves: And where any fuch perfon claims in feveral Counties, that fuch perfon be not heard till the laft County come to be adjudged, according to the forementioned order of priority wherein he is concerned.

That there be a priority of Counties, and that priority pofitively to be obferved, is of abfolute neceffity: It were very hard (dividing this Kingdome into thirty three Counties) to give them all the Alarm at once, and to continue them on that duty when but one quarter is attacked, we fhall out-bid the Winds uncertainty by a point, that, ever wandring within 32 points. Every man comes with the fpirit of a Gamefter, fairly confident to win, that is, to have his bufinefs fpeedily heard, the Englifh are ferved with procefs, who muft appear both Plaintiff and Defendant, and be drawn up, with their troops of witnefses (a fort of Ma-

litia that must not run in Arrears) alwayes ready to fight, but uncertain when the Court will give the signal: It will be charge and expence enough to both parties, when it is confined to a particular County, but without priority the charge will increase in proportion, as 1 is to 33.

As to the second part, to *postpone*, the Trial of the Claim ont in several Counties, to the time of the Trial designed for the last County: This will be a sole expedient to prevent Surprizes in hearing (no small fate to the English Defendant) and of no prejudice to the Irish Claimant; or if so it were *de minimis*, which in so comprehensive a Settlement is not regarded: For example, If a man have but three Acres in the County of *Dublin*, and a Thousand pound *per annum* in the County of B. as much more in the County of C. which is set forth to several Adventurers and Souldiers, when this priority of Counties, and postponing of Trial to the last County is established and publishd, all the Defendants are secure, until the Trial of the last County comes, and then the several three Counties make a united defence, whereas otherwise if he slip into his Tryal for his three Acres in the County of *Dublin*, and by a faint defence or otherwise, he be adjudged Innocent, it is likely that decree of once innocent, shall be alwayes innocent as to recover the remainder of his Estate in the other Counties, that never had notice of his Trial.

Next, it were manifest injury to the King, where the Trial may be, when the first County or last County comes upon the stage, to take away the right of Election from His Majesty, specially accompanied with a palpable loss and disadvantage: It is yet the Character of two great Generals, that one *Cunctando*, by delaying, recovered the lost Estate of the people; the other *Celerando*, by precipitation lost what was in possession.

Propos. 14. *That matter of fact cognizable by the Court of Claims be tried by Juries.*

We do not well understand, how by the Act any other way of Trial is allowed; for in some cases, least there might be a mistake of what proof is intended, it is particularly set down by Juries: Next, this Trial by Juries, is the ancient way and Birth-right of the People, *Stat. Super vias antiquas*: And though this Act had enacted a Trial otherwise, and

and onely in the affirmative, it would not have excluded or barred this ancient way of Tryal by the common Law, and which was before the Conquest (*Lamb. verbo centur.*) Besides, it is the clear uncontroverted construction of the Law, that wheresoever a Statute mentions the word Proof, the Law intends it of no other manner of proof whatsoever then that by Jury: The Court of Chancery, how often doth it recommend issues to the Tryal of the common Law Courts by Jury. Matter of Law and matter of Fact are divided, to the first the Judges answer, to the last the Jurors: Upon any wrong done by the Court, there lies remedy by error for the Subject, if by the Jurors, then by attain; but as now the execution of this great Act stands, admit the Court being Judges both of Law and Fact, will decree away my Estate, where is my remedy? The highest Court of Equity allows a review, *Hob. 202. 203.* Resolved by the Judges, That to try Causes that were naturally triable by the common Law and by the Jury by a Chancery way, would suddenly confound all Jurisdictions, and make the common Law, and all the course of it needless, and a Hand-maid to the Chancery. It is further considerable, that this will certainly bring great prejudice to His Majesties interest; for Jurors may find many things that the Court will not, or is not bound to take notice of, the finding whereof may vest the Estate in the King: A verdict may finde matter of Record, which was never given in Evidence; and so likewise matters of Writings and other things, not within the pleadings, or ever given in Evidence; and nothing can more contribute to the just discovery of men and their demeanors in these troublesome Times, then by the knowledge of their Neighbours, *vicini vicinorum facta presumuntur scire*: And there is no reason that the English Interest having but one Eye left them, as to this point of Discovery, and that not yet recovered from the bloodshed, should have that put out: Sir, if another reason moved, this would induce us, least we cast a dis-repute upon our ancient and known Laws, that make this Island a *terra firma*, as if these ancient Courts were onely Pleasure-Boats in fair Weather, and could not ride it out in a Storm: Sir, if we settle the Kingdome by any other means, then by the experienced rules of those Laws, we may hastily bring our wounds to healing and skinning, whilest a canies and corruption lyes at the bottom, which will break forth more incurable then at first.

Propos. 15. That no person shall be admitted to prove his Innocency, by any other Witnesses, then such as have constantly lived in the English Quarters.

We must with your Graces favour consider the issue again, (*viz.*) Guilty or not guilty of the Rebellion in Ireland; if so, no person that is *particeps criminis*, that is under the same guilt, ought to be admitted a witness against the King to prove the person upon his Tryal innocent, *facinus quos inquinat, aequat*: If a person be *infamis*, if he be attainted of a false verdict, or a conspiracy at the suit of the King, or convicted of perjury or felony, whereby they become *infamis*, or regularly he that loseth *liberam legem*, cannot be a witness; Now if your Grace consider what hath been hinted formerly, how the Rebellion in Ireland was maintained and owned by confederacy, association, by their representatives in the general assembly; that were *homines generici*, as Divines term *Adam*, when by his fall his posterity fell: if your Grace reflect upon the spreading consequences of it, that as it was vored by power, and trust sent from all the Counties, Cities, and Burroughs within their power, so it was magically acted in every part of this Kingdom; And lastly, if your Grace cast your eye upon the mark, and level in this case, the Act of Settlement, which upon these and other considerations, have called it universal, and almost National; it would seem but very just that such crimes should not be purged by persons guilty of the same, which all under that confederacy by the Judgment of Law and that Act are; These persons have by their own industry lost *liberam legem*, their Estates are forfeited as well as if it were by Office or Attainder, for what? it is answered upon the account of the Rebellion; then certainly the witness must be *rectus in curia*, before he can make another so, for *quicquid efficit tale, est magis tale*: in a *modus decuriandi*, against one, the rest of the Parishioners shall not be witnesses; in defence of Common against a Commoner, the rest shall not be witnesses, *Hob. 92*. And yet the union and tye in these cases, are not under such strict interest of association, as amongst the Confederate Catholicks of Ireland.

It may be objected, We make use of them against themselves: It is easily answered, it is but just and reasonable: A Tarryer is the only creature to unkennel a Fox, because he is got by a Fox and a Brache-hound; how is it possibly for us to prove such a person to have been at such a battle, to have contributed to their assistance, to have sat in their general assemblies,

semblies, but by persons frequent amongst them, and of their own confederacy, and such a witness is in Law a double witness, and the same reason urgeth the necessity of their proof by such as lived in our quarters; Besides, it is known how the Law is, in case of an approver, who though he confess the same Felony, *Stamf. pl. Cor. fol. 142.* Which either by direction of the Court, or at the prayer of the felon himself, is examined by the Coroner, and his examinations taken upon Record for the good of the King and Commonwealth: And sir, I suppose the opinion is maintainable, (especially as the proceedings are,) if he or they that were in arms in *Munster*, are not equally guilty of the blood shed by the Army in *Ulster*: they move by joynt Councils, from one publick stock of maintenance, the victory of one is the victory of the other, and consequently the blood shed by one, is the blood shed by the other: It is good Law that if a Man received a man that is attainted of felony by outlary in the same County, (though he be ignorant of it, yet) he is accessory to the felony, because the outlary is matter of record, of which every one ought to take notice; This were *ditius sermo*, a hard law, if when an open and universal Rebellion is maintained, and the Kings Colours flying in the field, and the Sword, and other Ensignes of Royalty at home, (as notable matters of Record, as an Outlary upon Proclamations in the County-Court,) that persons should not take notice of it, and then taking notice of it, should relieve and abet the Actors therein, and instead of being punished as accessories, they shall triumph, as witnesses to clear the principals, (if any accessories were in Treason,) the reason of the Law why if the 3. or 4. be in a room, and but one gives the deadly stroke, yet the other shall be accessories, is because the presence of the rest abated the courage of him that was killed to make his own defence: upon the same reason, all the confederate Catholics are accessories or principalls.

If it had been understood by the Protestants in *Ulster*, that this Rebellion had been only the attempt of Sir *Phelim*, or a rable, as in publick papers the Irish have termed it, so much blood had not been so cheaply spilt: but hearing it was universal, and countenanced by confederacy of all, that His Majesties Proclamations to lay down arms were contemned, this abated their Spirits, and made way for despair to dethrone resolution.

Propof. 16. *That when the Court doth give Judgment upon any caufe, that every refpective Commiffioner feriatim deliver his particular Judgment in open Court, with the reasons thereof.*

Sir, It is among the Ornaments of our Law, that matters are very learnedly debated at the Bar, and in caufes of difficulty, folemnly argued by the Judges on the Bench; In every leaf of our year Books and modern Reports, we may difcern the Judges opinions and their reasons; No doubt but Judges are under great temptation; and a greater check cannot be upon the frailty of our Natures, that they lye not under the protection of a concurrency: As true as it is, that virtue hath been scandalifed by an affinity with vice, fo likewise it is true, that vice gets a reputation by a commerce with virtue: That Cato did look on, was a reftraint; and no doubt but when fo great an audience as attends that Court, fhall hear every particular Commiffioners Judgment, and the reasons of it, whether it may prove as a means of caution to themfelves, yet furely it will give a great fatisfaction to the perfons concerned, upon whose uninterreffed Judgment they may repose as well, as upon their Counfels arguments; Thus it was in cafe of Ship mony. And fuch is the folemnity of Judgments, that they are entred *confideratum est per curiam*, if it be entred *videtur curia*, for the levity of it, error will reverfe it.

Propof. 17. *That where affidavit fhall be made, that one or more material witneffes being fummoned before the Court, refufe or negleâ to come in, that fuch cafe be fufpended.*

This propofal is the iffue of experience, for we are certainly informed, that divers perfons who have formerly offered themfelves as witneffes, and that have declared their knowledge, in order to prove the Noceracy of feveral perfons, withdraw themfelves: fome alledge they are under the cenfures of Excommunications, and Fulminations, (they are hard words, but happily your Grace remembers them, when not only your Grace, but fuch as fhould give your Grace any relief, or thofe that ferved under your command, have been involved in the fame) and perchance your Grace hath not forgot the operation of them, It is laid in Philofophy, *Alius addivorum non funt nifi in patiente bene pradifpofito*, how receptive the complexion of the people hath been of fuch influences

fluences, I shall pass by, onely thus much I must observe, if they were so powerful as to violate the bonds of Allegiance to their lawful & merciful Sovereign, they may without straining, dissolve the reciprocations of common equity amongst Subjects: Estates rest upon proofs, & if witnesses neither *flectuntur prece aut precio*, I mean their necessary and convenient Expences tendred; We must resort to the Law for its process: If they will not manage with a Snaffle, perchance their Heads may be brought into a reine with a Port bit: And upon Affidavit made, it is but reasonable to suspend the cause: There is no priviledge in this case by Law, to exempt them for giving Evidence in His Majesties behalf, and for Settlement of this Kingdom, which is the adæquate object of the Act. There are no stronger or nearer Relations then Man and Wife, that the Law in many respects esteems them as an *Individuum*: Yet a Wife for the King may be brought to give Evidence against her own Husband: *Privilegium non valet contra rempublicam*: A Master of a Ship laden with Merchants goods may call them over board, but if it be laden with Amunition, Ordinance, &c. of the Kings, to relieve his Army or Garrison, he cannot justifie to sling them over board, though the Vessel and Mariners lives are at the Stake (Bacons *mx. pag. 17.*) But is not the Settlement of the Kingdom of more worth (and that depends upon the faithful discharge of Evidence) then a particular Garrison.

Propos. 18. *That where any person or persons provided for to be restored by particular name to any Estate, that such person or persons shall not be admitted to claim the same under, or by any other way or means then is laid down in such Clause in the said Act, wherein he or they are so particularly named.*

May it please your Grace, This humble Proposal is one of the Poles upon which the Act of Settlement moves, and it hath its particular Aspect upon the Clause in pag. 31. of the Act, in which several persons are particularly named, and afterwards it is said thus, viz. *We do hereby Declare, That they and every of them, without being put to any further proof, shall be restored to their former Estates, according to the Rules and Directions in the last fore-going Clause of this Our Declaration, concerning such as continued with us, or served faithfully under Our Ensigns beyond the Seas.* Now, Sir, we have considered that fore-going Clause, viz. *That such persons shall be restored to their former Estates, a Reprieve being first assigned and legally set out of the remaining Forfeited*
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Land

Lands undisposed of, to such Adventurer or Souldier, or other person before named, of equal value, worth and purchase to the Estate, out of which such Adventurer or Souldier, or other person aforesaid shall be so removed. So that it appears clearly, none of these persons are intended by the Act to be restored without a previous Reprisal first set out: And they are as to the manner of their restitution, placed in the Catalogue of those that served beyond Seas under his Majesties Ensigns: Though nothing can be clearer, yet Sir, be pleased to observe, how in order to the designe of this Clause, several other Clauses in the Act are particularly framed for the execution of it. In pag. 26. of the Declaration, where the Rules of precedencies in restitution were set down, they are included in the provision made for such as served abroad, &c. or otherwise they were totally left out; but it was but reasonable since their manner of restitution was limited according to the restitution of those that served abroad, that they should be included with them, and it had been meer Surplusage to have mentioned them. Now, Sir, to proceed; in pag. 37. of the Act, there is a particular Clause for the further making the former Clause practicable, viz. In the next place, you are to take care, That the Adventurers, Souldiers, or other persons possessed of any of the Estate or Estates of such persons to whom We have by our said Declaration assigned a particular Favour, and are in a distinct branch thereof by Name expressed be Reprized, as in our said Declaration is expressed, and the said persons restored to their former Estates, from the time that such Adventurers or Souldiers shall be so Reprized. And be pleased Sir to observe, least this intimation might not be directory enough, it concludes, observing alwayes the former Cautions and Provisions in our said Declaration expressed, referring to the said persons restoration: That is, (page 20.) A previous Reprizal being first set out; One might think here were a particular Act of Parliament from themselves, ascertaining under what terms they wereto enjoy their Estates: But in the perclose of the whole Act, page 118, and 119. Provided also, and be it further Enacted by the Authority aforesaid, That in case Reprizals shall fall short, whereby persons mentioned and appointed in the said Declaration and this Act, to be restored without being put to any further proof, (This is the Character that denotes the same persons) cannot or shall not obtain or receive the full benefit intended them (Sir, be pleased to observe, there was no other benefit intended them) then it shall and may be Lawful for the Lord Lieutenant, or other Chief Governour or Governours, and Council, for the time being,

being, and they are hereby authorised to order, appoint and make distribution amongst them, of the satisfaction or restitution allotted them, in such proportion and method, as they shall judge most equal and just; consideration being had, of the conditions and pretences of the several persons concerned; Nevertheless; according to the Rules and Directions of the Declaration concerning them in all other points, and particularly of that of Previous Reprieve or Reprisals, which Order and appointment of theirs shall be final, and observed by the Commissioners appointed, or to be appointed for the execution of this Act. Any thing therein contained to the contrary in any wise notwithstanding; Thus Sir, your Grace sees how the interest of these persons so named, is fenced and bounded throughout the Act, so that indeed, the final determination of their interest cannot be adjudged, no, nor the Interest of any one of them ascertained, till the value of reprisals appear before your Grace and Council, and then your Order shall be final, and directive to the Commissioners: And it closeth home, with any thing contained to the contrary notwithstanding.

Now though this be so, they are beginning to leap over the hedge, & putting in the strongest foremost, and wave all these clauses, and put in their Claims upon the account of Innocency, upon which, they had once an election to have relied upon, but now it is determined by this clause: The reason that induceth them is plain, for if they should be Judged Innocents, then they are restored without any consideration of Reprisal: if they be Judged nocent, then they will keep this clause for a retreat: But Sir, I am commanded by the House of Commons, humbly to offer your Grace their opinion, that this is contrary to the whole course and reason of Law in the general, and very illusory to the main design of the Act; and in the opening this point, I have command to be an humble suitor to your Grace for your patience, his Majesties interest as to his Revenue, and the Protestants interest, being so highly concerned.

1. Sir, we presume it will be allowed, That an Act of Parliament binds all persons, for all persons are parties to it, 21. H. 7. 4. nay, my Lord Cook *Institut.* 4. p. 4. tells vs, that multitudes are bound by an Act of Parliament, which are not parties to the elections of the Knights, Citizens and Burgeesses, as all that have no Freehold.

2. Freeholders in ancient Demeasns.

3. All Women, having freehold, or no freehold.

4. Men within age, &c. *A fortiori*, then those are bound by this Act;

to which they themselves in person have given their assent: Now Sir as to the point in hand (*viz. That the persons that are by peculiar name, restored to their Estates, under a prævious reprisal, can claim them no other way, then the Act prescribes*) I shall humbly offer you the Judgement of the Sages of the Law in an instance or two: Where a Man hath title to Land by an Estate tail, and afterwards the same Land is given to him by Parliament, his Heir, shall not be remitted, for by the Act of Parliament all other Titles are for ever excluded; for this is a Judgment of Parliament, that the Estate shall only remain in the same very way that it is given: The same Law is, where the King hath a Title in tail, and the Land is given to him by Parliament in Fee; the Estate tail is determined, so that the Heir shall not avoid the Leases made by his Father; for the Statute binds all for titles and Estates, *B. Parliam. 73.* The reason given here, is for that it is a Judgment in Parliament, and of what extensive power, that is, even to take the right hand of an Act, *2. Insti- tut. 497.* will instance.

Nay Sir, the operation of a Statute casts it with that violence upon the party taking it, that if it had given me the Estate of any particular person by name, saving the right of that party, the saving had been flattering (as we call it) *1 Co. 47. a. b.* It is said, Though the Act be in nature of a Conveyance or Judgment, the saving is repugnant as to him that makes the Conveyance, or against whom the Judgment is given, or from whom the Estate of the Land is to pass; for though they be parties to the Act, yet in Judgment of Law the Land shall move from him that is seized (*Flowerden 49.*) it is there held, where Lands are given by Statute, it shall be interpreted the gift of the ter-tenant and the confirmation of all others that assent to the Act; for if it should be adjudged the gift of another person, the Parliament should do wrong to the ter-tenant, to take away the Land, and make another to give it. Sir, the application is easie and familiar to your Grace, who well remembers the great Solicitations that were made to get into this clause, it was lookt on as the Ark for those who could not endure the Examen of Innocency, and being nocent, found themselves bound by the Act, to be concluded by taking out of Lands in *Connought*, in compensation of their former Estates; they very well understood, that the gate of Innocency had no flaming sword over it, to keep any from entring, as great and powerfull provisions are made for such persons, as Wisdom could contrive; but the Law presupposeth every man knowing his
own

(371)
own Estate and condition best, will not make an election to his prejudice; but if he do, and that election is executed by an Act of Parliament, he is bound for ever, *Hob. 256.* it is thus.

Note an Act of Parliament hath every mans consent, as well present as to come, and he may be an Author of his own hurt, also he must hold as the Act gives it, having power to bind every Mans right, finally or *Sub modo*; & therefore if any person by his application to the King, when out of his Princely favour he hath granted his request, tho thereby he hath reitrencht himself of a provision otherwise held out unto him, he must lay his hand upon his mouth, and own the inconvenience to arise from himself; It hath been Judged, that licence for alienation by Parliament takes away the fine, otherwise by Law due to the King: The like in case of partition by Parliament between the Cohers of the Lord *Lezimor*. 1 *Le pl.* 113. the reason is given there, for that the Queen her self is party, and principal Agent, and therefore against her own Act she shall not claim the fine; And shall an Act attach the Revenues of the Crown, that are *firmamentum belli*, & *ornamentum pacis*, and yet a private person avoid & make illusions of a Statute, for which himself hath been a suiter; and to which, upon the passing of it, he hath personally given his vote:
Ecce modo mirum---

Sir, Nothing is more favoured by our Law then a Remitter, and even that upon construction of the Statute 27. *H. 8.* that ancient privilege of the common Law is so over-ruled, that the person taking by the Statute, in most cases shall not be remitted: and if a Statute by construction layes aside the indulgence of the Common Law in publick Settlements *a fortiori*, it will bind private Interests particularly exprest.

In the next place, I must observe, that all the clauses relating to these particular persons, though they are in the affirmative, yet being directory as to the form and manner of their restoration, *viz.* That they shall be restored from the time that such Adventurers or Souldiers shall be re-prized, &c. and *viz.* observing alwayes the further cautions and provisions in our said Declaration exprest, refering to the said persons restoration (p. 28. 29. 119. *Ad.*) they carry in them a Negative; for it is a rule, That all Statutes that limit a manner & form in execution of matters that were not so by the rules of the Common Law, though they be in the affirmative, they are in substance in the negative, as if it had been exprest, That it shall be done in that manner and form, and no otherwise: so hath been adjudged upon *West. 2. c. 4.* that gives,

Quod

Quod ei deferunt, and that the Demandants may *Vocare ad warrantum ac si essent tenentes*, that is as much as if it had said, *Et nullo alio modo*; and so 11 H. 7. c. 20. where it is said, he shall enter, enjoy and possess the Land, according to his title in them, it shall be understood, according to his title, and in no other manner, *Plowd.* 113. Now to restore a Nacent, that is, one guilty of Rebellion, to his former estate, certainly will be granted, it is not agreeable to common Law, why then when this Act particularly names some of them, and that under the Character of Nacent persons, and presents the way, order and means of their restoration, not once, but through the texture of the whole Act, it must needs rationally follow, that it is intended, and no other way. The Act saith, *You shall observe the Rules for their restoration*: what is the rule? it is this, after a *previous* reprisal; but if you take him out of this clause, and put him upon Innocency, then he is to be restored before a reprisal: I humbly ask, How is the Act answered, that sayes, Thus it shall be: No, saith the Court, it shall be thus: And by saying so, a great part of the Act is made to signifie nothing (nay, that part of the Act upon which the Protestant interest wholly depends, for that being observed, they are sure to have their penny, or a penniworth, the Estates they now enjoy, or reprisal) which by the plain and genuine construction, preserves all the part of the Act in symmetry, and proportion; and I am sure this was the Judgment of the House, upon passing the Act: I shall shut up this point with that which should have had the preference, even the consideration of His Majesties Revenue; if the persons be held to the clause of their own election, they are to pay the same rents the Adventurers and Souldiers pay by the acre; if otherwise, their former rents, which are not considerable: We know upon whose account it is, that his Majesty is at that great charge to maintain an Army here, it is but reasonable a round share of the charge should lye on them; whilst the greatest Estates of the Irish in this Kingdom, that are rationally qualified by this Act, if they escape it, the Protestants do bear the burthen, and they scarce touch it with their little finger.

Propos. 19. *That the Officers before 49. and their Tenants, shall be admitted Witnesses to give evidence for his Majesty in any cause whatsoever, depending before the Court of Claims.*

Sir, We must remember again the Tryal (*viz.*) Guilty or not guilty between the King and the party, and that in matter of Treason, which premised,

premisses, I might say no more to evince the lawfulness of any of his
 Majesties Subjects, to give evidence upon such a Tryal: I shall admit, that
 regularly no man shall be witness in his own Cause: but this is to be un-
 derstood *cum grano salis*; It is said in our Law, *Judicis officium est, ut res*
ita tempora rerum Quarere, quasito tempore, tutus eris; I have hinted before
 how difficult it is for proof to be made after so long a tract of time spent
 in War, and in confusion since 41. till his Majesties happy restauration:
 The Act saith the Witnesses have been slain, and those few, the Offi-
 cers serving before 49, whom Providence reserved, when God impan-
 nels a Jury to enquire after Blood, must be challenged: The wayes by
 which Evidence might have been had, have been by the power of the
 Sword drawn against the Law obstructed, and therefore it may be
 said to such guilty persons, *frustra qui in legem peccat a lege pe-*
tit auxilium: were an unlawfull assembly at this day in a riotous po-
 sture, the Justices and Sheriffs, with the power of the County, might re-
 sort to the place and view the force and record it; but this was too
 dangerous an employment for them, when an Army of Horse and Foot
 could not undertake it without hazard: And if few or no other Witnesses
 are left, it were to impose too much irrationality on our Law, that by the
 Rules of it Treason might pass with impunity; to prevent which, the
 Law hath recourse in extraordinary cases to extraordinary means: It
 is a maxim, *quod remedio destituitur ipsa re valet si culpa absit*: and there-
 fore the Law will allow an *avowry* without *attournment*, where he hath no
 means to compel the test to atturn, 6.Co.68.a. so where impediments hap-
 pen by the act of God, the Law judges according to the necessity: If one
 be bound to repair a bank of the Sea, if he by negligence suffers the Wa-
 ters to surround his Neighbours ground, he is lyable to waist, but if by vi-
 olence of Tempest an inundation happen, he is excusable. If the Heir at
 full age tender Livery, and dieth before he hath made homage, the Law
 gives him the advantage of his tender in the same way, as if it had been
 accompanied with all the solemn circumstances attending it: If a dis-
 seiser die seised, the disseisee being in prison, or beyond the seas, it is no
 descent, Finch Nom. 17. *Necessitas vincit communem legem*; and therefore
 if two joynt-tenants be of Land, and to the Heirs of one of them, they
 shall not joyn in a writ of right, and yet they shall joyn in a writ of right
 of an advowson; For if they shall not joyn, neither the one nor the other
 hath any remedy. 5.Cr.40.b. *Illud quod alias licitum non est, necessitas facit*
licitum & necessitas inducit privilegium quod jure privat: and upon this
 ground

ground was the Bishop of *Salisbury*'s case judged of the grant of an Office, with an annuity contrary to the Statute, 1. *Eliz.*

But Sir, was there ever greater necessity, is not the settlement of the Kingdom in its Critical hour, is not the Banes publisht, Now to give Evidence, or for ever after hold our peace? Do not Nocent persons pass in triumph Innocency, whilst those stand by whose Evidence, if admitted would write the Letter of Condemnation on their Fore-heads? These were the men that broke through the Hoast to draw water, to get Evidence, by marching into the Enemies Quarters daily encountering them, and now the water must be spilt on the ground, and they denied to say, they ever did see them: This is worse then to muffle the mouth of the Oxe whilst he treads out the straw: Persons in many cases may be examined, where the consequence may be to obviate a penalty, they may be subjected unto: A Sheriff may be examined upon his own return, a foreign Plea may be sworn: An Infant levies a Fine, and brings a writ of Error to reverse it, yet he may be examined: Debt upon arrerages of accompt, the Plaintiff may be sworn if there be any such accompt, and by this he takes away the benefit of the Defendant to wage the Law: The party rob'd upon the Statute of Hue and Cry shall be examined, and so upon a forcible entry, though the party may have restitution, yet he may be examined: In a writ of Entry brought, an Effoin was cast for the Defendant in the Kings Service, in *partibus transmarinis*, and the Effoiner was examined and sworn *de veritate effonia*, Dyer 154.

I might proceed, that though *iniquum est aliquem sua rei esse iudicem*, yet in some cases one may be Judge, Master and Carver: Lessor covenants to repair the house, if he do not, and the Lessee doth it, he may pay himself out of the Rent, 12. H. 8. 11. Taylors and Hostlers may detain the Garment and Horse, till reasonable satisfaction be made.

It may be added, how little those Officers serving His Majesty before 49. are subjected to those Temptations, upon which the Law in its rigour grounds it self, to exclude interested persons from being Witnesses. The bulk of that remote possibility of satisfaction is but gleanings and fragments (their reward is, that they know his Majesty hath an esteem of their services and sufferings) joyn that with the worth of the persons being all Commissioned Officers, and then who could without injury to the Law of charity judge them, that to preserve those Oaths of Allegiance & Supremacy they have sworn, inviolably, have put no rate upon their lives & fortunes, & have not worshipt the Idols of the Times, though the
Oven

Oven was seven times heated, I say, who can judge, nay think, that for an Acre of Land to be divided among them, they would stoop to so sordid a Crime as Perjury : The Peers of the Realm upon this account, pass upon Tryals of Blood, onely declaring their judgements upon their Honour : But surely our case is plain, and that they are not onely Lawful witnesses, but under strong obligations, if any yerson be indicted of Treason to give in Evidence their knowledge in matter of Fact, Tenant for life, and the remainder over : If Tenant for life be indicted for Treason, he in the remainder may be a witness, though in that case, when one goes to the Bough, the other goes to the Plough.

Propos. 20. Upon motion to the Court that any aged or impotent person that can give Evidence for his Majesty, That their depositions be taken by Commission, and lodged in the Court, to be produced in His Majesties behalf, as the same shall require.

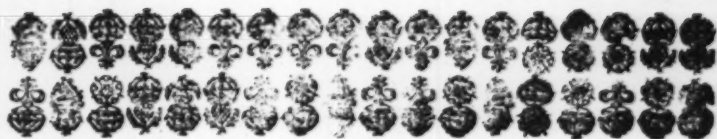
This is not denied in the case of the Subject, Commissioners to examine, *in perpetuam rei memoriam* are frequent ; it is but reason to use all good Husbandry for the king, and to pickle up such proofs, as through age cannot keep long.

Thus may it please your Grace, I have past by those several heads given me in charge by the House, humbly to present to your Grace, with the instance of some of those many reasons they had under their consideration ; The conclusion of the Instrument is this, *viz.* These are the particulars which are presented to his Grace and Council, as the result of the Observations which have been hitherto made upon the late proceedings ; and that this House humbly desires His Grace, That when Time and Experience shall suggest any thing of like moment with the above particulars, His Grace and Council will be pleased to receive them ; and if any thing therein offered through the straitness of time, be not sufficiently cleared, His Grace and Council would be pleased to admit a Committee of the House of Commons, to confer with a Committee of the Board upon the same ; and that in the interim if any Cause to be heard by the Commissioners, may receive prejudice under any of these Proposals, being undetermined, that the Commissioners being ascertained of the same, may suspend any thing of it, till His Grace and Councils pleasure be further known.

It rests onely to beg your Graces pardon, if in discharging the Trust reposed in me, I have been enforced to use some words of Discrimination; it is against the inclination, nay the prayers of the House (if the Subject matter could dispence with it) to avoid them: They know the compleat Peace of the Kingdom rests not in cessation of armes, but in union of Hearts; and they doubt not but under the prudent administration of His Majesties Authority vested in Your Grace, we shall arrive to that happiness, that it may be said, *Jam cuncti gens una sumus*; Ay, Sir, and *se finis in eum*; We complain not of the want of a good Law, for the Settlement of this Nation upon sure and lasting Foundations, such that nothing but our sins can subvert. If the Spirits of all Kings living had been extracted, they could not have contributed more to revive a gasping Kingdom, then the wisdom of our Royal Sovereign, blest with a Divine assistance, hath in His Act of Settlement recorded, to Perfume and Enbalm His Name to all Ages: But Sir, *Corruptio optimi est pessima*: It is not the Sword but the Hand that gives Protection, or a Wound, with respect to the efficient cause: The Law saith, All hail Protestants of *Ireland*, but if the execution be dissonant, we are crucified under a glorious Inscription of mockery.

The Execution of the Law, is the Soul of the Law; the want of this hath transmitted this never-dying Truth to Posterity, That *nulla est tam misera servitus, quam ubi jus est liberum & vagum*.

F I N I S.



February 13. 1662.

ORdered by the House *nemine contradicente*, that Mr. Speaker having this day so faithfully delivered the sense of this House, unto his Grace the Lord Lieutenant: Do cause his Speech to be Printed and Published, and that it be entred into the Journal of this House.

Philip Ferneley,
Cler. Parl.

